80-943

Supreme Court, U. S.
FILED
DEC 11 1980
MICHAEL RODAK, JR., CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JOHN RICHARD CURTIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH DISTRICT, DIVISION ONE

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Questions Presented

1. There is a split of authority throughout the United States as to whether or not an administrative subpoena may take the place of a search warrant.

2. Can an overzealous prosecutor seize documents without a search warrant mainly by using the Corporation Commission as a tool whose issuance of a subpoena was only used for the District Attorney's purpose.

3. The search and seizure was conducted without a search warrant and without Petitioner's consent, which must be obtained, even if the administrative subpoena was lawfully produced.

4. A clerical worker has no authority to consent to a search of the offices or of the warehouse in a business

situation.

5. The substitution of two alternate jurors after deliberations had begun deprived Petitioner of due process under the Fourteenth Amendment.

6. The entire concept of the use of the Grand Jury system within the federal system and within all of the States of the United States except California and Minnesota, is now under attack from all areas, and this question should be resolved at this time to settle the constitutional question of fairness, equity, and justice, as among the States and the federal circuits.

7. Petitioner was denied due process of law when the California Appellate Court refused to allow him a preliminary hearing after declaring Grand Jury proceedings without such a hearing unconstitutional,

in violation of the due process and equal protection clause of the United States Constitution.

8. The trial judge failed to give a separate conspiracy instruction to the jury according to the rule of the United States Circuit Courts in a case involving multiple defendants in multiple business structures, corporations, partnerships, and limited partnerships: The failure to provide such instruction violated the due process clause of the United States Constitution.

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In the

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October Term, 1980

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE

William James Zumwalt, on behalf of Petitioner John R. Curtin, prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal entered in the above case on Aug. 26, 1980. Petition for Hearing was denied by the California Supreme Court Oct. 29, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is found in Appendix A, infra, pp. 1a-88a and is reported ____ Cal.App. 3rd ____.

JURISDICTION

The judgment of the court below (Appendix A, infra, p. 88a) was entered on August 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 257(3).

Questions Presented

1. There is a split of authority throughout the United States as to whether or not an administrative subpoena may take the place of a search warrant.

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mainly by using the Corporation Commission as a tool whose issuance of a subpoena was only used for the District Attorney's purposes.

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United States except California and Minnesota, is now under attack from all areas, and this question should be resolved at this time to settle the constitutional question of fairness, equity, and justice, as among the States and the federal circuits.

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structures, corporations, partnerships, and limited partnerships: The failure to provide such instruction violated the due process clause of the United States Constitution.

STATEMENT

The case is a complex prosecution of Petitioner CURTIN and others for violation of the California Securities Law, grand theft by fraud, multiple securities conspiracies, and one count of conspiracy covering all parties over a period of many years. We bring the case to the attention of this Court because the prosecution and conviction of Petitioner was so outside the principles of fairness demanded by our system of justice as to have denied him procedural due process of law as mandated by the Constitution of the United States.

Petitioner CURTIN was charged in an indictment containing 132 Counts charging five different violations of State law:

(1) Grand Theft, (California Penal Code Section 487.1);

(2) Sale of Securities, (Corporations Code Section 25110);

(3) False Statements In the Sale of Securities, (Corporations Code Section 25401);

(4) Using A Scheme To Defraud in the Sale of Securities, (Corporations Code Section 25541);

(5) Conspiracy To Commit Grand Theft, (Penal Code Sections 182.1/47.1).

Various motions were filed and heard by the court in lengthy pretrial proceedings. For the purposes of this Petition we only set forth the motion to suppress evidence and the motion for a postindict-

ment preliminary examination. In addition to this, Petitioner is complaining and will set forth more fully errors made by the trial court and raised in his brief to the California Court of Appeals.

The trial was held before a jury and lasted approximately nine months. At the conclusion of the trial, Petitioner was found guilty on all the counts charged except one and those dismissed by the trial judge prior to the trial. The evidence adduced during the course of the nine month trial heard by the jurors and considered by them applied overwhelmingly to two other codefendants, one MACK and one SKELTON. Over 90 percent of the evidence in this matter did not apply to Petitioner CURTIN.

Generally speaking, the indictment rose out of an organization called Ryan

Group West which was predominantly involved in the insurance field. Various financial programs for investors were set up in the early 1970's. These programs were set forth in the indictment as the 10%-11% Option Limited Partnership Program, (Counts 1 through 12, 47 through 60, 84 through 95, and 126); the Pamco Dairy Investment Program, (Counts 20, 60, 103 and 127); the Darivest Limited Partnership Program, (Counts 23 through 80, 71 through 76, 104 through 109, and 128); the RGW Warehousing Joint Venture Program, (Counts 29 through 35, 77 through 83, 110 through 116, and 129); the Palmdale 4 Plex Joint Venture, (Counts 36 through 40, 120 and 121, and 130); the Palmdale Medical Complex Joint Venture, (Counts 41 through 44, 45); the Placid Hills Joint Venture, (Count 46); and the allegation of con-

spiracy, (Count 132).

In essence, Ryan Group West, through its agents and employees, would contact an interested individual concerning a program, i.e., the 10%-11% Option Limited Partnership Program. In that program, for instance, funds received from investors were to be placed in the limited partnership account to purchase real property trust deeds which were to return, on the original investment, a profit of 10%-11% per year. Investments were made into this program; however, due to the poor financial status of Ryan Group West, these partnership funds were diverted to other accounts to pay certain and, presumably, more pressing obligations. The other programs dealt with dairy operations, housing projects in Nevada, crop sales, trust deeds, and a medical complex. In

each program it was alleged that funds paid by investors to a specific program were diverted to other uses and that the purpose of the programs, as represented to the investors, was never accomplished.

From this indictment and the testimony of some 90 witnesses and the admission of over 900 documents into evidence, the jury convicted all the defendants in this case.

REASONS FOR GRANTING THE WRIT

I

CAN AN OVERZEALOUS PROSECUTOR SEIZE DOCUMENTS WITHOUT A SEARCH WARRANT MERELY BY USING THE CORPORATIONS COMMISSION AS A TOOL, WHOSE ISSUANCE OF A SUBPOENA WAS ONLY USED FOR THE DISTRICT ATTORNEY'S PURPOSES?

Numerous motions were made prior to trial and during trial to suppress documents seized by the District Attorney's Office under the pretense of Corporation

Commission subpoenas by way of the provision of Penal Code Section 1538.5.

On January 26, 1977, Jonas W. Pumphrey was called to testify at the Section 1538.5 Motion to Suppress Documents taken from Ryan Group West. Mr. Pumphrey had been assigned to the Fraud Division of the District Attorney's Office since 1972. He testified that he acquired Ryan Group West records located at 14724 Ventura Boulevard, Sherman Oaks, California. The records were taken from this address in the presence of Mr. Tom Doyle, an investigator from the Department of Corporations. He also testified that Mr. Wickersham from the District Attorney's Office in San Diego was with him, along with an attorney from the Department of Corporations, whose name escaped him at the time of testimony.

Mr. Pumphrey testified that Tom Doyle

had a subpoena, at the time of the taking of the documents from the above address; the implication is that he had no search warrant. He also testified that the subpoenas were issued by the Department of Corporations. Again, no search warrant was obtained by either party or by Mr. Pumphrey that date.

It was indicated by Mr. Pumphrey that Mr. Wickersham, Deputy District Attorney, took 78 legal boxes that date at the above address. Later, Pumphrey testified that he went to another location the same day, January 7, 1975, with Wickersham. Pumphrey also indicated that he had been working on this case since October of 1974 and at that time was assigned to investigate the matter.

The second place that Mr. Pumphrey indicated he visited was the Bear Van and

Storage in greater Los Angeles, where he took possession of approximately 10 or 12 legal boxes of additional records of Ryan Group West. All of these boxes, from both locations, were transported to the courthouse in San Diego County while in the custody of Deputy District Attorney Wickersham on January 7, 1975.

In other words, the documents were taken from both locations directly to the District Attorney's Office without a search warrant, and none were taken to an office of the Department of Corporations. Approximately 79 cartons were taken in all during these two seizures.

At the Section 1538.5 Suppression Motion, on questioning by Deputy District Attorney Wickersham, Mr. Pumphrey testified that the records were taken from the above locations because the District Attorney's

Office had inquired into the business operation of Ryan Group West. It was further testified by Mr. Pumphrey that Mr. Wickersham participated in the selection of the material taken from Bear Van and Storage and that the selection was based on what Mr. Pumphrey and Mr. Wickersham thought was relevant to the investigation by the District Attorney's office. Further, a truck was rented from San Diego and not from Los Angeles, where the Corporation Commissioner's Office and investigative staff is located. Mr. Pumphrey testified that the reason that the Corporation Commission delivered the documents, 79 boxes, to the District Attorney's Office in San Diego was because the Department of Corporations didn't have any place to put them. They took the boxes approximately 130 miles south for

lack of storage in Los Angeles County.

It was interesting also to note that Ms. Haney, a former employee of Ryan Group West, is the only one who was given a subpoena to produce the documents; neither RYAN, MACK, CURTIN, SKELTON, or any of the other principals in this case were ever served and never gave their consent to the seizure of these documents. Indeed, at the time the subpoena was given to Ms. Haney, she was not an employee of Ryan Group West.

Mr. Wickersham, the Deputy District Attorney in charge of the case, was in the van when it was rented and when it picked up the records, and assisted in their selection. Further, after the records were delivered to San Diego, they were put in a vault under the exclusive control of the District Attorney's Office. The

records were never moved from the District Attorney's Office or ever used by the Department of Corporations.

Harold Rassi was called to testify as an investigator for the District Attorney's Office. He testified that the records picked up at the Bear Van and Storage warehouse were the ones that later turned up in the District Attorney's Office. Mr. Rassi further testified that he did participate in the acquisition of the records from Bear Van and Storage in November, 1975. He also went to the location of Ryan Group West records in Van Nuys, California, with Mr. Wickersham, and met Mr. Doyle from the Department of Corporations. Thomas A. Doyle was an investigator for the Department of Corporations. Rassi also testified that he transported those documents, received at

the above places, to the District Attorney's Office in San Diego.

The motions to suppress the documents as evidence were denied by the Court.

The District Attorney introduced these seized records and used them as evidence against Petitioner throughout the trial.

The Court of Appeals ignored Petitioner's two major points of contention with regard to the motion to suppress: by the time the documents were seized, as a matter of law, the Corporation Commission's subpoena power had ended, necessitating a search warrant; and, absent the search warrant, Petitioner never consented to the seizure by the District Attorney, nor was an attempt to secure his consent made. [Citations below].

A. A SEARCH WARRANT WAS REQUIRED FOR THE DOCUMENTS SEIZED AT RYAN GROUP WEST AND THE WAREHOUSE

Our case presents to this Court a fascinating issue of unreasonable search and seizure with far-reaching ramifications for prosecutors and businessmen alike. Because of the use of an administrative subpoena duces tecum by a prosecutor to obtain business records for use in a criminal prosecution, the real issue somehow became obscured and for the most part was never even addressed by either the trial court or the appellate courts of this State.

It is academic that the "police" may not enter a business office and seize business records without first obtaining a search warrant without violating the Fourth Amendment rights of the citizens

entitled to possession of those records. Just such a violation occurred in this case, yet no court reviewing the question has seen that obvious and simple point. We ask this Court to rule the seizure of the business records of Ryan Group West was an unreasonable search and seizure on its face, in order that the true issue of consent to such violation may be discussed and decided.

As a general, long-standing rule, the Fourth Amendment requires a warrant to seize documents such as those seized in this case:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (Emphasis supplied) U.S. Const., Am.IV.

The "papers" of CURTIN are thus explicitly protected by the Fourth Amendment; and, the Fourth Amendment is incorporated by the Fourteenth Amendment so as to apply to State officials. Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

But it is not the Petitioner's contention that the Corporations Commissioner had no subpoena power; rather it is that at the time the subpoena was used, its power was misused because its objective was not investigatory, but prosecutorial.

In Donaldson v. United States, 400 U.S. 517 (1971), the Court held that where "the sole objective of the investigation is to obtain evidence for use in a criminal prosecution the purpose is not a legitimate one..." 400 U.S. at 533. There can be little doubt as to the sole objective

here.

The Corporations Commission officer was accompanied to the sites of the searches and seizures by Mr. Pumphrey and Mr. Wickersham of the District Attorney's Los Angeles and San Diego offices, respectively. If the only initial involvement of the District Attorney's office was to provide space for the documents which couldn't fit in the Corporation Commission's office (as the Court of Appeals asserts), then there was no need for a District Attorney to show up at the seizure.

Further, the issuance of a subpoena must be in good faith:

> "[I]f it can be shown that the investigative agent had already formed a firm purpose to recommend criminal prosecution

even though he had not yet made a formal recommendation, issuance of the summons would presumably be in bad faith."

United States v. Wall Corporation, 475 F.2d 893 (D.C.Cir. 1972).

What better evidence of the Corporations Commissioner's purpose than the fact that it permitted Messrs. Pumphrey and Wickersham, District Attorney's representatives, to participate in the selection of the material taken, to base selection of the material on what Mr. Wickersham thought was relevant to prosecution, and the failure by the Corporations Commission to ever use the documents, now firmly under the control of the District Attorney. The documents seized were used by the District Attorney at trial.

These facts point to a sham. The

Court of Appeals upheld the trial court on this issue because Corporations Code Section 25533 expressly authorizes the Commissioner of Corporations to refer evidence to the District Attorney. But Section 25533 contemplates that the Corporations Commission will subpoena the documents for its own use, and from their use of them, possibly decide whether they warrant a criminal prosecution. Here, the Commission never used the documents. They handed them to the District Attorney without ever determining what action the documents warranted.

Additionally, no matter what subpoena power is authorized by the Corporations Code, it is cut off under Donaldson and Wall at the moment a criminal prosecution is intended. There can be no doubt that at the moment the subpoena power was used,

that intent was formed by the Corporations Commission. Without the cloak of the subpoena, a search warrant is therefore required.

Nor can it be said that the defect in the subpoena was waived. There was never any indication to Petitioner that the subpoena was for the exclusive use of the District Attorney. So he could never have waived the defect in the subpoena in the first place. Therefore, the Court of Appeal's reliance on People v. Warburton, 7 Cal. App. 3d 815, 86 Cal. Rptr. 894, cert. denied 400 U.S. 1022, (1970) is misplaced. Petitioner does not deny the general validity of a subpoena. He does argue that this subpoena, issued and used only for the investigatory purposes of the District Attorney, was void, and thus any search and seizure required a warrant.

Donaldson v. United States, supra; United States v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977).

Our case is not Donaldson or Warburton, because in those cases, the "police" did not accompany the administrator to seize records. In Donaldson and Warburton the records were "turned over" to a prosecutor after the taking by the administrator. The abuses the ruling in our case portents are staggering. All a policeman would have to do, under the ruling in our case, is get a "friendly administrator" with an exparte subpoena duces tecum and seize whatever he wanted.

The Fourth Amendment as applied to businessmen's records would cease to exist. The ruling in our case must be overruled.

B. THE SEARCH AND SEIZURE WAS CONDUCTED WITHOUT A WARRANT AND WITHOUT PETITIONER'S CONSENT

The real point of legal interest in this situation is whether or not a "consent" to the unreasonable search and seizure, binding upon Peititoner, was granted to the prosecutor. There was some evidence to the effect that Petitioner's two codefendants agreed to allow the Commissioner of Corporations to view and obtain some of the records through use of administrative subpoena. There is evidence that a clerical caretaker of the records of the then defunct business structure known as the Ryan Group West did not object when the prosecutor appeared to seize the records. There is no evidence that Petitioner agreed in any manner to the

taking of the records by anybody for any purpose. There is no evidence that anyone, except the clerical worker, had the remotest idea that it was the "police" and not an administrative bureaucracy that wanted the records.

The Court of Appeals apparently hung its hat on a concept of "consent" without really dealing with the issues raised by this Petitioner. Petitioner never consented to the search of the documents. Only codefendants MACK and SKELTON were told that the documents might be shown to the District Attorney. Petitioner was never told, even though he too, had a "legitimate expectation of privacy" in not only the premises but the things searched. Rakas v. Illinois , 439 U.S. 128 (1978).

C. THE CLERICAL WORKER HAD NO AUTHORITY TO CONSENT TO A SEARCH OF THE OFFICE OR WAREHOUSE

Marsha Haney, who consented to a search of the documents, was not even an employee of Petitioner but was an employee of Skelton Management. Therefore, she clearly had no authority as a stranger to consent to a search of offices. Further, as a stranger, she would also not have apparent authority to consent to a search. [See, United States v. Sells, 496 F.2d 912 (7th Cir. 1974)].

Even if Ms. Haney were an employee, that status does not automatically confer upon her the authority to consent to a search. It may be said that, on this often confused and disarrayed issue, courts attempt to assess and evaluate the employ-

ment responsibilities of the employee as they relate to the nature of the search being challenged. See, State v. Cook, 242 Or. 509, 411 P.2d 78 (1966). Indeed, if the employer is readily available, an employee's consent is ineffective, United States v. Ruffner, 51 F.2d 579 (D.Md. 1931). Certainly Petitioner was available if Wickersham wanted to obtain his consent, and there is nothing in the record to the contrary.

Often the test to be applied is whether the employee was given "possession and control" of the area. United States v. Murphy, 506 F.2d 529 (9th Cir. 1974). Under this theory, the prosecution would have to prove that Ms. Haney was vested with complete supervision of the corporate documents, which they have not even attempted to do. United States v.

Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946). Several recent cases have directly held that a mere clerical employee such as Ms. Haney had no authority, actual, implied, or apparent, to consent to a search of her employer's office. People v. Polito, 42 Ill. App. 3d 372, 355 N.E. 2d 725 (1976); People v. Smith, 43 Mich. App. 400, 204 N.W. 2d 308 (1974).

Nor can the State rely on United States v. Sells, supra. In Sells, the police had been told by the owner's son that a particular employee who gave the consent was "in charge." There is no indication anywhere in the record that anyone told the police Marsha Haney was in charge.

Despite this issue having been raised below, the Court of Appeals did not even bother to discuss it. Yet the area of

of employee consent is so uncertain, and its impact on this case so crucial, that the issue begs for a resolution - a resolution in favor of Petitioner CURTIN.

Third party consent has been in disarray since the Supreme Court discarded the "agency" theory of Stoner v. California, 376 U.S. 483 (1964), in United States v. Matlock, 415 U.S. 164 (1974). Some six theories can be identified in several states, some of which appear in the same case.

Some states do not allow employee consent: People v. Smith, 43 Mich.App. 400, 204, N.W. 2d 308 (1972); Hays v. State, 38 Okla. Cr.App.331, 261 P.232 (1927). Three circuits and 37 states have not decided the question.

Since the search was invalid, the documents, as fruits of the illegal search,

must be excluded from evidence. Mapp v. Ohio, supra; People v. Superior Court (Freeman), 14 Cal. 3d 82 (1975); People v. Mazel, 45 Cal. App. 3d Supp. 1 (1974). The failure to exclude was not harmless error. Indeed the prosecution has never even attempted to show beyond a reasonable doubt that the illegally seized and erroneously admitted documents did not contribute to the conviction, even though this is the test for "harmless error." People v. Kampmann, 258 Cal. App. 2d 529 (1968). Absent this showing, the conviction of Petitioner CURTIN must be reversed. Chapman v. California, 386 U.S. 18 (1967).

D. CONCLUSION

Since the Corporations Commission never intended to use its subpoena in furtherance of its own investigation, and

actually used it only to obtain documents for the District Attorney, the protective power of the subpoena vanished, necessitating a search warrant. Since no one had a search warrant, the search and seizure needed to be justified under an exception to the warrantless search rule. The state did not show exigent circumstances. Petitioner did not consent to the search at all, despite having a legitimate expectation of privacy in the documents, and any consent given by anyone was limited in scope - and that scope was exceeded. Nor did Ms. Haney have any authority to consent to a search. Therefore the search and seizure were illegal, the documents obtained thereby were improperly admitted, and the conviction must be reversed.

Finally, there remains for the court a more basic issue: The propriety of the

District Attorney's conduct. Convictions are often reversed merely to punish outrageous police or prosecutorial misconduct (e.g., entrapment cases). If ever a procedure was so outrageous that it needed to be stopped by reversing a conviction which that procedure brought about, this is the procedure and this is the conviction.

The District Attorney has reduced the Corporation Commission to a helpmate just as it has done with the grand jury. The independence contemplated by the Corporations Code subpoena power was compromised in this case by the District Attorney's use of Mr. Pumphrey merely as a camouflage for the District Attorney. At the actual seizure, it was the District Attorney, and not the Corporations Commission, who picked out the documents. It is the District

Attorney, and not the Corporations Commission, who has sole possession and control of the documents, and who has used the documents. The state cannot point to any evidence that the Corporations Commission was indeed independent; and, absent that independence, the subpoena, which might have been a guarantor of Petitioner's Fourth Amendment rights by permitting an independent evaluation of the documents outside the influence of the prosecutor, became instead a tool to destroy those rights.

II

PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE CALIFORNIA APPELLATE COURT REFUSED TO ALLOW HIM A PRELIMINARY HEARING AFTER DECLARING GRAND JURY PROCEEDINGS UNCONSTITUTIONAL FOR ALL OTHERS CHARGED WITH CRIME WHERE A POSTINDICTMENT PRELIMINARY HEARING HAS BEEN DEMANDED.

In the instant case, the Petitioner made a motion for postindictment preliminary hearing which was denied. At the same time, the California Supreme Court was considering the case of Hawkins v. Superior Court 22 Cal.3d 584, (1978). In the Hawkins case, the California Supreme Court ruled that a person charged with a crime was entitled to a postindictment preliminary hearing. Also, the California Supreme Court ruled that their pronouncement in the Hawkins case was not retroactive by stating that the Hawkins rule would apply only to the present case and to those indicted defendants who have not entered a plea at the time this opinion becomes final.

In this case the record shows that Petitioner entered a plea before the opinion became final. However, even in

the Hawkins case, the Supreme Court recognized that "in criminal actions, where life or liberty is at state, courts should not adhere to precedents unjust to the accused. It is never too late to mend." Id., n.7, p. 593.

The rule imposed by the California Supreme Court in the Hawkins case concerning the retroactivity of its own decision should not be applied in the instant case.

Petitioner submits that with the conceded denial of a vast array of his "fundamental" Federal and State Constitutional Rights, the Hawkins, supra rights should be guaranteed to him, as well.

In the Hawkins, supra, decision, the California Supreme Court held its ruling was applicable only to those indicated defendants who had not entered a plea at

the time the decision became final (22 Cal.3d at 594).

In view of previous United States and California Supreme Court decisions outlining the standards for determining when retroactivity is required, Hawkins' denial of retroactivity is both illogical and inconsistent with established legal doctrine. In fact, the California Supreme Court has recognized this when it acknowledged in the case of In Re Montgomery that "The United States Supreme Court has consistently accorded full retroactivity to rules of criminal procedure fashioned to correct serious flaws in the fact-finding process of trial." In Re Montgomery 2 Cal. 3d 863, (1970).

Hawkins, supra, itself acknowledged that the denial of post-indictment preliminary examination was as serious a

deprivation of rights as the denial of legal counsel (22 Cal.3d at pp. 592-593.) The United States Supreme Court decision of Gideon v. Wainwright 372 U.S. 335 (1963), incorporating the fundamental right to counsel in criminal matters into the Fourteenth Amendment Due Process clause, was a decision which caused an enormous impact on the judicial system and its workload, a decision that tremendously upset the State officials' reliance on previous case law, and a decision which had far-reaching consequences. And yet, due to the basis fundamental nature of the Constitutional right involved, the decision was applied retroactively.

Other matters having far less of an impact than the Gideon v. Wainwright, supra, decision have had greater retroactive application than the Hawkins,

supra, decision. The most acknowledged application of such decisions would appear to apply the decisions to cases not yet final at the time said decisions are rendered. Mapp v. Ohio 367 U.S. 643 (1961).

DENIAL OF DUE PROCESS AT A CRITICAL STAGE

In Coleman v. Alabama 399 U.S.1, (1969), the United States Supreme Court concluded that the preliminary hearing is a critical stage of the criminal process "at which the accused is 'as much entitled to such aid [of counsel]... as the trial itself.'" (Id. at p. 10, quoting Powell v. Alabama 287 U.S. 45, 57, (1932). The Alabama preliminary hearing was far less "critical" than its California counterpart, because its sole purpose was to determine if there was sufficient evidence against the accused to justify bringing

the case before a grand jury. Nevertheless the Supreme Court held the "guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." (Id. at p. 9).

The conclusion is inescapable that if a preindictment proceeding is a critical state of the criminal justice process requiring due process safeguards, a fortiori, the indictment proceeding itself is a critical stage.

EQUAL PROTECTION

Under traditional equal protection analysis it has now become axiomatic that persons similarly situated must receive like treatment under the law. (In re Antazo 3 Cal.3d 100 (1970). If fundamental rights or "suspect classifications" are involved the state bears the heavy

burden of demonstrating a "compelling" interest necessary to achieve a substantial goal. As stated in Serrano v. Priest 5 Cal.3d 584 (1971), "'in cases involving "suspect classifications" or touching on 'fundamental interests',...the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.'" (Id. at p. 597), quoting Westbrook v. Mihaly 2 Cal. 3d 765 (1970).

In all criminal cases the district attorney, and by extension the State, makes a distinction between those defendants

who will be prosecuted by indictment and those who will be prosecuted by information. One class of defendant receives a preliminary hearing with the attendant rights heretofore enumerated, while the other class receives no preliminary hearing and no procedural protections. The two classes are in all other respects identical and, indeed, as the instant case demonstrates, embrace not only the same crimes but occasionally the same individual. The classification is not based on any state objective which may be considered legitimate, but rather is grounded on the arbitrary goal of vesting in the People vast prosecutorial advantages which the grand jury system affords.

For the foregoing reasons, Petitioner urges that equal protection requires that all criminal defendants have the same

opportunity to prove to a magistrate that there is no probable cause to bind them over for trial. "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation or the expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed." Jaffe v. Stone 18 Cal. 2d 146 (1941). A proceeding of such significance cannot, consistent with the constitutional mandate of equal protection, be selectively denied.

THE INSTANT CASE

California is not the first state to recognize the necessity of requiring post-indictment preliminary hearings. Recently the Supreme Court of Michigan, exercising the inherent power of the court over

matters of criminal procedure, held that all indicted defendants are entitled to such examinations as a matter of right. By relying on inherent power the Michigan court avoided what was characterized as "serious questions of equal protection and due process ... since [the present system] denies to an accused indicted by a multiple-man grand jury what has become recognized as a fundamental right to most criminal cases - the right to a preliminary examination." People v. Duncan 388 Mich. 489, 201 N.W. 2d 629 (1972).

The facts of the instant case provide an excellent demonstration of the value of such a postindictment hearing. Forty-three witnesses, including one of the defendants, testified before the Grand Jury resulting in 652 pages of transcript and some 111 exhibits. At the conclusion of

the Grand Jury presentation, a forty-four (44) count indictment was returned against Petitioner.

At the conclusion of the District Attorney's examination of each witness, the Grand Jury members submitted their own questions. Of the 43 witnesses, the Grand Jury asked questions of only nine witnesses. None of those nine witnesses (Agosta, Harte, Schuricht, Loewenthal, Hancock, Mack, Osborne, Clyne, Carmichael and Silver) were asked questions concerning Petitioner's participation in the alleged acts.

III

THE TRIAL JUDGE FAILED TO GIVE A "SEPARATE CONSPIRACIES" INSTRUCTION TO THE JURY ACCORDING TO THE RULE IN UNITED STATES CIRCUIT COURTS IN A CASE INVOLVING MULTIPLE DEFENDANTS IN MULTIPLE BUSINESS STRUCTURES, CORPORATIONS, PARTNERSHIPS, AND LIMITED PARTHERSHIPS; THE FAILURE TO PROVIDE SUCH AN INSTRUCTION VIOLATED

THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

The State of California refuses to recognize the rule espoused by the United States Supreme Court in Kotteakos v. United States 328 U.S. 750 (1946) that there is a great danger of transferring guilt from one defendant to another across the lines separating multiple conspiracies, when, as in our case, separate multiple conspiracies were clearly identified from the beginning and a single conspiracy was not proven. All of the Circuits of the United States espouse the rule that the jury must be instructed specifically on this real danger. In United States v. Tara, 562 F 2d. 1345, 1351 (2d Cir. 1977), cert. denied 434 U.S. 853 (1978), the Court held it was proper and necessary to instruct the jury that if the evidence

shows a possibility of multiple conspiracies it must acquit a defendant unless it finds that he was a member of the single conspiracy charged in the indictment.

The United States Court of Appeals has adopted what is called the "prejudice test" in which the court's instructions leave the question of single or multiple conspiracies to the jury, and instruct the jury that if it finds multiple conspiracies it must keep the evidence of a single overall conspiracy apart from the evidence of multiple conspiracies. The reality that the jury convicted Petitioner JOHN R. CURTIN on the basis of all the evidence in this case without such a precautionary instruction, which was refused by the trial judge, denied Petitioner CURTIN a fair and impartial trial.

The statement of facts in our case

summarizes the matters in which Petitioner CURTIN, over a relatively short period of time, was working in various programs within the Ryan Group West organization. Since the Ryan Group West organization was such a loosely knit business structure whose leadership changed hands on numerous occasions, it would be impossible to prove who was in control, at any given time, of the finances of the organization. It is, however, clear that the evidence, direct and indirect, showed that people other than Petitioner CURTIN did have such control and that Petitioner CURTIN had none.

Petitioner CURTIN was indicted in a 132 count indictment. During pretrial motions, the trial court dismissed 30 to 40 counts against Petitioner CURTIN. Subsequently, the jury convicted Petitioner

CURTIN of all of the counts (except one or two) upon the same evidence on which all of the other defendants were convicted. The evidence was the same as it applied to all of the counts of the indictment, including those counts which were dismissed against Petitioner CURTIN.

The trial judge dismissed one-third of the counts against Petitioner CURTIN, leaving those counts against the other defendants intact. The jury convicted all defendants on those counts upon the same evidence.

It is apparent Petitioner CURTIN would have been convicted of all of the counts in the indictment, including those which were dismissed, had the trial court not dismissed them against Petitioner CURTIN in the first instance. This very reason alone, i.e., that the evidence was

the same as it applied to all of the defendants, along with the fact of dismissal by the trial court of one-third of the counts against Petitioner CURTIN, shows that there was more than one conspiracy involved in this case. It also shows that the jury could not distinguish one conspiracy from another, or one participant from another or others in these possible multiple conspiracies, because of the nature of the various businesses which were being conducted.

There were various corporations, partnerships, and limited partnerships involved. There were various land sales programs, building programs, and cow leasing programs involved. There were numerous different people involved in conducting these various programs. This brings us to the "heart" of the issue.

We recognize the limits that have been placed upon Kotteakos but we also recognize that there is an area in which Kotteakos still applies. We are in one of those areas in our case. Our case is different from the average drug conspiracy case, (where Kotteakos has been held to not apply) which involves the smuggling of marcotics from outside our country to be purchased by a dealer inside our country, to be sold to distributors on the street. This typical drug case does involve several conspiracies but it differs from our case because our case involved many different programs, coming from different sources within a loose business structure, with the programs being operated by many different people at many different times. The drug program contains a single line of conspiracy involving certain people from

the importation to final distribution.

This case does not have that kind of single-minded purpose or parties. Our case is described in Kotteakos as a number of truly different conspiracies if, in fact, there were any conspiracies at all. Petitioner's contention is that the jury was not given the opportunity to make any determination as to multiple or single conspiracies even though it was mandatory for the trial court to give instructions to allow the jorors to decide just where Petitioner CURTIN stood within the complex framework of all the programs, corporations, partnerships, limited partnerships, and other business ventures that were being conducted by numerous persons on multitudinous business situations. This failure denied Petitioner CURTIN due process of law.

The trial judge allowed volumes of evidence to be introduced against all of the defendants when in fact Petitioner CURTIN and his two codefendants at various times had nothing to do with the evidence presented. The various defendants not only had nothing to do with fragmented evidence pertaining to various programs within the loose business structure but, in many cases, they were not even employees or principals of that loose structure.

The judge did give precautionary instructions about limiting the import of certain evidence against certain defendants. It must be believed that once the judge made these admonitions, more than one conspiracy was perceived. If not, the judge would not have attempted to protect a certain defendant against

evidence presented against one or more of the other defendants. The judge's admonitions were in and of themselves inconsistent with his failure to give a Kotteakos instruction. Further, the hearsay rules were so circumvented in this trial as to deny Petitioner CURTIN his right to confront witnesses as required under due process.

The evidence at the trial showed that in many situations the defendants did not have any relationship with one another. The proof showed that the president of the company, one ROBERT RYAN, was working independently from Petitioner JOHN CURTIN most of the time, and in most of the various programs, Defendant MACK was working independently of Defendant SKELTON and Petitioner CURTIN. On some occassions the defendants worked together

on some programs but their organization in this company, if you can call it organization, was one of independent operators "doing their own thing" at any particular time in any given program.

Petitioner CURTIN never controlled any of the funds of the business structure. In an organization of this nature, if you do not control the money, you cannot control what happens within the organization itself, but Petitioner CURTIN was convicted on the theory that he did have control. The other defendants had control of the finances of the company at various times as shown by the evidence. They also had direct control of the people who were employed by the company and they had control of the directions their various programs were going to take and to whom the programs were to be sold. None of

the evidence showed Petitioner CURTIN had this kind of authority.

It is interesting to note that Petitioner CURTIN was found guilty on conspiracy count 132. He was also found guilty on counts 127 and 128, which involved a violation of the Corporations Code by the fradulent conspiratorial sale of security programs. Of those three counts, the broad conspiracy of count 132 and the more narrow conspiracy type counts of 127 and 128, Petitioner CURTIN had nothing to do with the RG Warehousing joint venture charged in count 128. Yet he was found guilty of a charge involving RG Warehousing. The double charging, in the absence of a Kotteakos instruction, confused the jury to the point it found Petitioner CURTIN guilty of acts with which he had absolutely nothing to do.

There are other programs, such as the dairy programs, in which co-defendant SKELTON was the mainspring and manager, and in control of all of the funds. There were also land programs involving the building of four-plex apartment houses and Petitioner CURTIN had nothing to do with these. Yet he was named in the same indictment with the other co-defendants who controlled these programs entirely with no assistance or no help, as the evidence below showed and, yet, the trial court refused to give a multiple conspiracy instruction, claiming that everything came under one conspiracy. How is this possible when the court itself dismissed almost 40 of the counts of the indictment against Petitioner CURTIN on the basis that he had nothing to do with these programs? Obviously there was more than

one conspiracy.

Petitioner is not arguing that the trial judge himself did not find more than one conspiracy. He just ruled on the basis that the California law does not require a multiple conspiracy instruction. For that reason, he did not give one.

The prejudice to the defendant was especially horrendous because the trial involved 900 exhibits, and some 90 witnesses who all came in and testified about all of the defendants at the same time, and it would have been impossible for any jury of reasonable intelligence to separate the evidence in this case out, as against each defendant individually. This variance is so crucial and so manifestly unjust as to deny Petitioner CURTIN a fair and reasonable trial.

Finally the Second Circuit in

United States v. Bertolotti, 529 F.2d 149, (2nd Cir. 1975), has adopted the prejudice test rule: When the indictment charges one overall conspiracy and the proof shows a series of smaller ones, there has been a material variance which would require a finding of which defendants were so prejudiced by the variance as to be entitled to a reversal of the convictions as in this case. Again, a Ninth Circuit case, United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970) cert. denied 401 U.S. 924 (1971), held that where there was evidence of an overall single conspiracy, the jury could find that there was a single conspiracy even though the individual participants' periods of activity overlapped, and the court held further that this is a question that must be submitted to the jury.

IV

SUBSTITUTION OF TWO ALTERNATE JURORS AFTER DELIBERATIONS HAD BEGUN DEPRIVED PETITIONER OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

Substitution of one alternate juror after deliberations have begun deprives Petitioner of his constitutionsl right to a fair trial by jury. Twice in the case at bar jurors were substituted after deliberations had begun.

California law permits such substitution under People v. Collins, 17 Cal. 3d 687 (1976), if the court instructs the jury that deliberations must begin anew, But such a limiting instruction is not satisfactory since substitution places enormous pressure on new alternate jurors to conform to the conclusions already reached by the remaining primary jurors on issues of fact or guilt or

innocence.

Not only will such a result strain the concept of due process, but it is a result which has caused every Circuit and 40 of the 50 states to bar post-deliberation substitution. Only seven affirmatively permit it, and three are unclear. The appropriate statutes can be set out for the Court upon the granting of this Petition. The gravamen of the argument is that this Court must decide this issue for two reasons: the states are badly split, and procedure itself (as recognized in 40 states and every Circuit) violates due process.

Collins presumes jurors can cleanse their minds of all deliberations that occurred before substitution. As noted above, the pressures on new jurors makes such a proposition untenable. To

maintain the proposition, as California had done here, would violate every precept of fairness embodied in the concept of due process.

CONCLUSION

We submit that the underlying reason for the gradual erosion of fairness to Petitioner's prosecution and others like it is that the regulatory mandates of securities laws and regulations, and similar regulatory laws, and the operation of businesses thereunder, have become so complex that the judiciary at the local leval have literally "lost" the clarity necessary to conducting a fair criminal trial in many of these cases, including our own. The necessity for clear guidelines from this Court would become apparent from a reading of the myriad of motions and writs, and the transcript

of a nine month jury trial which resulted in Petitioner's conviction.

This case presents the prosecutor, defense attorney, courts, defendants, and the businessmen of this country with Constitutional issues begging to be resolved, including the rights of businessmen against unreasonable search and seizure, the need for a multiple conspiracy instruction, and the abuse of the retroactivity issue.

The present petition for certiorari should therefore be granted.

Respectfully submitted,

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Appendix A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and	)	
	)	
Respondent,	)	4 Crim.
	)	
v.	)	No. 8922
	)	
DONALD EUGENE SKELTON,	)	(Super. Ct.
	)	
et al.,	)	No. CR 37345
	)	
Defendants and	)	
	)	
Appellants.	)	
	)	
	)	

APPEAL from judgments of the Superior Court of San Diego County. James L. Focht, Judge. Affirmed as modified.

Wetzel & Noone and George C. Wetzel for Defendant and Appellant Donald Eugene Skelton.

Appellate Defenders, Inc., under appointment by the Court of Appeal, and Stephen J. Perrello, Jr., for Defendant and Appellant James Evans Mack.

William James Zumwalt for Defendant and Appellant John Richard Curtin.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, A. Wells Petersen and Keith I. Motley, Deputy Attorneys General, for Plaintiff and Respondent.

After a nine-month trial, the jury convicted Donald Eugene Skelton, James Evans Mack and John Richard Curtin

(appellants) of multiple counts of grand theft (Pen. Code, § 487.1), sale of unqualified securities (Corp. Code, § 25110), securities fraud (Corp. Code, §§ 25401, 25541), and conspiracy to commit grand theft (Pen. Code, §§ 182.1, 487.1).

Before trial, the court denied defense motions to suppress evidence to set aside the indictment for failure to comply with statutory procedures and a Johnson (Johnson v. Superior Court, 15 Cal.3d 248, 255) motion to dismiss for claimed withholding exculpatory evidence and to sever defendants and the conspiracy count.

The jury convicted Skelton of 25 counts of grand theft, 1 count of conspiracy to commit grand theft, 27 counts in violation of Corporations

Code section 25110, 35 counts in violation of Corporations Code section 25401, and 6 counts in violation of Corporations Code section 25541. Mack was convicted of 33 counts of grand theft, 1 count of conspiracy, 35, 39 and 6 counts in violation of sections 25110, 25401 and 25541 of Corporations Code, respectively. Similarly, Curtin was convicted of 19 grand theft counts, 1 conspiracy, 19, 17 and 3 counts in violation of Corporations Code sections 25110, 25401 and 25541, respectively.

Motions for a new trial were denied. Skelton and Mack were sentenced to prison for the term prescribed by law for one count of grand theft. The remaining counts were ordered concurrent with the exception of conspiracy to commit grand theft,

which was ordered stayed pending service of the sentence on the other counts. Curtin's sentence was suspended and probation was granted for a period of nine years on the conditions he serve eight months in county jail, perform 200 hours of volunteer labor and make restitution.

FACTS

Robert Ryan created Ryan Group West (RGW) from a sole proprietorship through which he conducted his insurance business. Ryan attempted in 1972 to cover money shortfalls by organizing various investment programs under the umbrella of RGW.

These programs were broadly divisible into dairy and land investment. The dairy programs consisted of Professional Agricultural

Management Company (PAMCO), Dairivest Limited Partnership (Dairivest Ltd.) and RGW Warehousing Joint Ventures (Warehousing).

The Dairy Schemes

PAMCO was an investment concept in which dairy cows were leased to individual investors under a management agreement. One unit of PAMCO, consisting of 50 head of cattle, was leased for $6,850. This money was represented to be used to secure feed. The investor was to receive a 20 percent return on his investment, secured from profits from the sale of milk, plus a return of capital in five years. PAMCO was portrayed as a "tax shelter." PAMCO became Dairivest

Farms, Inc.,[1/] although PAMCO continued to be listed as the management company in later leases.

Dairivest Ltd. was conceived as 20 limited partnership units at $8,500 each. This satellite operation of RGW was to take place in Yakima, Washington. The general partner was represented to be Cow Palace Limited.

None of the dairy programs were profitable enough to make promised payments to investors. Because many of these investors were also insurance customers of RGW, any loss resulting from closure of the dairies would have been disastrous to Ryan's insurance

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FOOTNOTE 1: Dairivest Farms, Inc., is to be distinguished from Dairivest Limited Partnership (Dairivest Ltd.).

business. To obviate such a financial crisis, payment to old investors was made out of funds supplied by new investors.

In an attempt to keep the dairies afloat, bring in new money, a new investment concept was conceived to purchase hay and grain in advance, to store it for use by dairies. Warehousing contemplated a minimum investment of $3,000 into a pool until a unit of $60,000 was obtained. Skelton and Curtin assured investors money received was to be held in reserve until the target $60,000 was reached and grain was purchased. However, no grain was ever purchased and the funds were diverted to the Dairivest account, were used for salaries and operating expenses. Investment funds received

from the several programs were not applied to any particular account but were diverted on an as-need basis to other programs, other needs of Ryan and the appellants.

This "pyramid" type bubble finally collapsed in December of 1974 when only 900 cows of dubious health remained to fulfill the unit (lease) obligations for 2,750 cows owed to investors. At all times, the maximum head count of cattle leased by PAMCO (Dairivest) and Dairivest Ltd. was 1,500, 1,250 under the 2,700.

The Land Sales Schemes

RGW land programs consisted first of the "11 percent option plan" with investments from $1,000 to $10,000 in trust deeds. The investor was to

receive 11 percent interest per year on his investment paid from interest on the notes secured by deeds of trust and "they would also put in a two and-a-half-acre piece of land." At the end of ten years, RGW would return their investment or a percentage of the value of the 2.5 acre parcel supposedly worth $10,000.

The land subject to this scheme was located in Antelope Valley. It was worth less than the $10,000 claimed. It was not free and clear as represented but was mortgaged to 90 to 95 percent of its value. Further, most of the notes securing the trust deeds were owned by other entities, Trend Corporation, Land Wholesalers and Investment Administrators Incorporated, corporations controlled by principals of

RGW. Again money generated was misused, embezzled, misappropriated to other investment schemes. The special program designed for Captain John Brown illustrates the land scheme in operation. In the summer of 1974, just before the collapse of RGW, Brown was promising a 15 percent return secured by specific trust deeds in exchange for $54,000. Brown's money was spent immediately to cover pressing financial needs, no trust deeds were ever assigned.

Skelton, Curtin and Mack each participated at high levels in the operation of RGW's various investment programs. Skelton spearheaded PAMCO sales teams in 1973 and by November took over the construction portion of RGW. By January 1974, Ryan turned over

to Skelton responsibility for the entire organization which included control of the RGW warehousing dairy, medical complex and fourplex programs. During this period he was in control of the flow of funds in RGW. At his direction, Warehousing funds were put in the Dairivest Ltd. account. Skelton assured investors Dairivest Ltd. was financially solid and accepted investments well after he knew no new leases of cows were secured to meet the promises to the investors.

Curtin was legal counsel for RGW and held himself out as "primarily concerned with the financial responsibility" of RGW. He presented and explained the PAMCO and Dairivest Ltd. programs. He assured prospective investors they were private offerings

exempt from requirements of registered securities. In letters to investors Curtin assured the soundness of the programs and their success.

Additionally, Curtin drafted the RGW warehousing program. All of Curtin's convictions arose out of the dairy and warehousing program,[2/] excepting the conspiracy count which encompasses all of his various activities from 1971-1974.

Mack occupied various high level executive offices in RGW and its investments. He served as executive vice-president and for a period of time served as president.

Briefly he served as president of

FOOTNOTE 2: Curtin's involvement is set forth in greater detail (infra XIII) where we examine the substantial evidence supporting his multiple convictions.

Investment Administrators Inc., the land division of RGW. In April 1972 Mack became one of five directors to RGW and eventually became executive vice-president. As executive vice-president he maintained substantial power controlling the inside operation of RGW.

In the fall of 1973, Mack became president and director of PAMCO and of Alameda Construction Co. related to construction of Palmdale Medical Complex. His position in PAMCO made him signator on the checking account and give him responsibility for daily decisions as to which obligations to pay. Mack did most of the negotiating for leasing the cows to meet investment obligations, yet he continued to accept new investments.

Mack transferred or directed others to transfer money from one trust purpose to another by moving funds from one program to another, e.g., from the dairy accounts to the insurance accounts. Mack and Ryan would make joint daily decisions on where to put money to cover hot spots, i.e., overdrawn accounts. Mack frequently ordered the bookkeeper to use investors' money for operating expenses.

Mack's participation in corporate efforts to raise money to solidify RGW's position was significant. The executive secretary, who took orders from Mack and others, typed two different versions of the same financial statement; and one statement would be more supportive of financial solvency. The more favorable statement was used for sales presentations.

CONTENTIONS

Appellants[3/] contend (1) the indictment was defective as exculpatory evidence known to the district attorney was withheld from the grand jury and because the grand jury failed to weigh all of the evidence; (2) the court erred in denying motions for a post-indictment preliminary examination; (3) motions for severance were improperly denied; (4) the seizure of documents pursuant to Corporation Commission subpoena were violative of statutory and constitutional authority and evidence obtained should have been suppressed; (5) Skelton claims he was

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FOOTNOTE 3: Pursuant to rule 13 of the California Rules of Court, each defendant has joined in all applicable issues raised here by co-defendants. Accordingly, arguments and dispositions are consolidated wherever possible.

denied the right to cross-examine and confront witnesses against him; (6) the court erred in refusing to allow the jury to determine as a matter of fact whether the investment programs constituted "securities"; (7) error occurred in failing to sustain appellants' objection to the indefiniteness of the conspiracy pleading; (8) error occurred in admitting specific evidence of co-conspirators' conduct in violation of Evidence Code section 1101; (9) the trial court erred in refusing to instruct the jury must be unanimous in finding defendant's specific intent to commit grand theft during the period of his individual participation in the alleged conspiracy and at least one overt act at that time; (10) the court

erred in refusing to give a multiple conspiracy instruction; (11) the court erred in instructing the jury regarding false or misleading statements in terms of CALJIC 2.03; (12) the evidence against Curtin is insufficient to support his convictions on any count; (13) the evidence of corporate securities fraud is insufficient to convict Mack; (14) this court (Court of Appeal) erred when it reinstated counts 61 through 76, 80 through 83, and k26 of the grand jury indictment, and (15) finally, sentencing error (Pen. Code, § 654) occurred in the imposition of multiple terms on Skelton and Mack.

DISCUSSION

I

Grand Jury Proceedings

Skelton sought to dismiss the

indictment based upon the claimed failure of the prosecution to present evidence to the grand jury that would have reasonably tended to negate his guilt. (Johnson v. Superior Court, supra, 15 Cal.3d 248, 255.) The only specific evidence Skelton pointed to was an "exculpatory" statement made by him to Investigator Rassi. He also made a blanket assertion that 120 boxes of material in the possession of the district attorney should have been given to the grand jury for its examination. Skelton here alleges new facts claimed as exculpatory. The record discloses no attempt by Skelton to raise below specific objection to the prosecution's failure to disclose the "investigator transcript" to the grand jury. He is precluded here.

(People v. Manning, 33 Cal.App.3d 586, 601.)

The statement to Rassi was a self-serving hearsay declaration by Skelton. It would be inadmissible at trial, therefore was precluded from presentation to the grand jury. (Pen Code, § 939.6, subd. (3)(b).) The trial court correctly assessed Skelton's motion in stating "there is nothing I could put my finger on here." We agree.

Skelton next claims the grand jury failed to weigh all the evidence submitted to it. It is argued the grand jury could not consider exhibits -- even though marked and approved by the foreman -- until they were formally admitted into evidence; that it was physically impossible for the grand jurors to weigh and consider all

of the 115 exhibits -- numbering 5,000 pages -- in a period of one and one-half hours. The grand jury heard testimony for seven days before issuing its indictment. These many documents were admitted near the close of the hearing; yet they had been the subject matter of seven days of oral testimony. Penal Code section 939.6 upholds an indictment supported by sufficient competent evidence, which includes testimony of witnesses produced and sworn before the grand jury, despite the fact the grand jury also arguably receives objectionable evidence. If it be assumed the grand jury should not have considered the 115 exhibits until formally introduced into evidence, the indictment is not defective for it is completely supported by competent

evidence. (Cf., Rideout v. Superior Court, 67 Cal.2d 471, 474.)

The trial court found after "fair review" of the record, the grand jury did give consideration to the evidence as presented; it fulfilled its duty to weigh all the evidence. Skelton's motion was properly denied.

II

Post-Indictment Preliminary Hearing

Appellants assert they were denied due process of law under both the United States Constitution and the California Constitution when the trial court refused to grant them a preliminary hearing.

In Hawkins v. Superior Court, 22 Cal.3d 584, the Supreme Court held the denial of a post-indictment preliminary hearing deprived defendants in felony

prosecutions of equal protection of the laws guaranteed by article I, section 7 of the California Constitution. This rule, however, is to be limited in its retroactive effect. As the Hawkins court stated:

> "Because of the previous reliance by the bench and bar on the validity of current postindictment procedures, the rule announced herein shall apply only to the present case and to those indicted defendants who have not entered a plea at the time this opinion becomes final. [Citation.]" (Id., at p. 594.)

Hawkins became final on December 13, 1978. The plea by Skelton was entered on July 23, 1976. Similarly, Mack entered his plea July 23 and Curtin plead on November 29, 1976. All three defendants fell without the scope of the new rule announced in Hawkins v.

Superior Court, supra, 22 Cal.3d 584, 594. (See also Sherwood v. Superior Court, 24 Cal.3d 183, 186; People v. Weiner, 91 Cal.App.3d 238, 247.) The trial court properly denied the motion for a post-indictment preliminary hearing.

III

Motions for Severance

Appellants assert the trial court erred in denying their motions for separate trials. "When two or more defendants are jointly charged with any public offense . . . they must be tried jointly, unless the court order separate trials." (Pen. Code, § 1098, italics added; People v. Romo, 47 Cal. App.3d 976, 985.)

The trial court exercised this discretion and concluded "much of the danger of unfairness can be avoided by

providing separate counsel for defendants . . . proper instructions to the jury." Moreover, great weight was given to the difficulty the prosecution would encounter if separate trials were ordered. Many of the chief prosecution witnesses were from out of state.

Skelton and Curtin point to "the vices inherent in a mass trial . . . are the danger that the jury will find one or more defendants guilty as charged because of his association with evil men; . . ." (People v. Bichler, 198 Cal.App.2d 290, 298.) This is a legitimate concern, yet the Legislature has placed discretion in the trial court to take such steps as necessary to obviate this problem. The record reflects the trial court felt measures short of severance were adequate.

Skelton admits the joinder of offenses satisfied the requirement "'there is a common element of substantial importance in their commission'" (In re Pearson, 30 Cal.2d 871. 874) but suggests the consolidation of grand theft with the conspiracy count prejudiced him because of the relaxed hearsay rule of Evidence Code section 1223 applicable by virtue of the conspiracy charged. He posits the real danger was conviction solely due to his association with co-conspirators.

The trial court weighed this factor but concluded the preference for joint trials prevailed over the complication of issues. There is no factual base to conclude the court abused its discretion. (People v. Gabourie, 92 Cal.App.3d 1, 7, fn. 2;

People v. De La Plane, 88 Cal.App.3d 233, 251.)

Reliance on Castro v. Superior Court, 9 Cal.App.3d 675, is misplaced. Castro involved the peculiar fact of First Amendment infringement. Considerations of free speech and association are absent here, thus making Castro reasoning irrelevant. (Id., at p. 682.)

Next Curtin asserts "Aranda error" arose from the denial of separate trials. In People v. Aranda, 63 Cal.2d 518, 530-531, the Supreme Court held where the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a co-defendant, the trial court must adopt one of the three described procedures. The ameliorative

procedures mandated by Aranda have no relevance here. Curtin sets forth no "confession" of a co-defendant implicating him. His claim of "prejudice" is not supported by a single reference to the record. Skelton's claim of error on this ground is equally specious. The fact that his defense was diametrically opposed to that of Mack and Curtin does not require a severance midstream. (People v. Simms, 10 Cal.App.3d 299, 306.) In any event the motions for severance were thoroughly explored by the trial court. The complex interrelation between the defendants as well as the crimes committed favor joinder, not severance. A denial of the motion will be disturbed on appeal only for abuse of discretion resulting in substantial

prejudice to a defendant. (People v. Duane, 21 Cal.2d 71, 78.) "Where the consolidation meets the test of joinder," as it does here, "the difficulty of showing prejudice from denial of severance is so great that the courts almose invariably reject the claim of abuse of discretion." (Witkin, Cal. Criminal Procedure, p. 288, quoted with approval in People v. Rhoden, 6 Cal.3d 519, 525, fn.2.) We find no abuse of discretion.

IV

Motion to Suppress

Appellants next contend the seizure of corporate records by subpoena duces tecum (Corp. Code, § 25531) was illegal; the materials taken should have been suppressed.

Stanley Iezman, an attorney with

the enforcement division, Commissioner of Corporations, directed the issuance of 16 subpoenas duces tecum addressed to various RGW entities.

The San Diego District Attorney's office was notified of the investigation and due to the large volume of records to be seized -- exceeding storage capacity of Iezman's office -- arrangements were made to store the records at the San Diego District Attorney's office.

After inventory by the Department of Corporations agent in Los Angeles, approximately 79 cartons of material were placed in storage at the San Diego District Attorney's office. The Department of Corporations agents made continuing use of these documents during dozens of visits to San Diego.

The trial court denied the Penal Code section 1538.5 motion finding there was no conspiratorial subterfuge by the district attorney to utilize the Corporations Commission to avoid the interposition of a neutral magistrate. The Department of Corporations acted in good faith after a formal investigation by the Corporations Commission was underway. Defendants' cooperation and failure to object waived any objection to the constitutionality of the subpoena.

Appellants argue that the Department of Corporations, while having no authority to investigate, had no authority to retain and turn records over to the district attorney absent the commissioner's authorization and that the use of the subpoena duces

tecum amounted to an unconstitutional search and seizure.

Corporations Code section 25533 expressly authorizes the Commissioner of Corporations to "refer such evidence" of violation to the district attorney of the county in which the violation occurred. While the statutes refer to the "Commissioner" yet it is "the office of the Commissioner" or the "Department" that executes the statutory duties on behalf of the commissioner. (St. John v. Superior Court, 178 Cal.App.2d 794, 797; People v. Park, 87 Cal.App.3d 550, 569, 570.)

Concerning the constutionality of such subpoenas, the California Supreme Court has concluded:

> " There is no constitutional objection to a system under

> which the heads of departments of government may compel the production of evidence for purposes of investigation, without instituting formal proceedings against the one from whom the evidence is sought or filing any charges against him.
> . . . Insofar as the prohibition against unreasonable searches and seizures can be said to apply at all it requires only that the inquiry be one which the agency demanding production is authorized to make, that the demand be not too indefinite, and that the information sought be reasonably relevant. [Citations.]" (Brovelli v. Superior Court, 56 Cal.2d 524, 529.)

Appellants uncritically equate service of a subpoena duces tecum with entering an office and forecible seizing papers found there. When police unjustifiably enter an office and seize papers, privacy is irrevocably destroyed. But the issuance and service of a subpoena do not, by themselves, invade

the private papers of anyone. If the person having custody of the papers believes the subpoena is defective, and he is unwilling to waive the defect by his voluntary compliance, he may make a motion to quash the subpoena (see Southern Pac. Co. v. Superior Court, 15 Cal.2d 206, 209) or he may refuse to comply and present his excuse when enforcement is attempted against him (C. S. Smith Met. Market Co. v. Superior Court, 16 Ca.2d 226).

Where the custodian chooses to disregard defects in the process, and comes forward with the papers and records, Fourth Amendment rights have not been invaded. (People v. Warburton, 7 Cal.App.3d 815, 824; People v. Park, 87 Cal.App.3d 550, 570.)

Here Mack and Skelton received

subpoenas and were told the materials might be reviewed by the district attorney, yet neither objected. In fact, Skelton made arrangements when the documents could be obtained. There is no duty to inform a party of the right to refuse of move to quash a subpoena before a waiver can occur. (People v. Park, supra, 87 Cal.App.3d 550, 570; People v. Warburton, supra, 7 Cal.App. 3d 815, 824; cf., People v. Duran, 9 Cal.3d 218, 241.) Denial of the motions to suppress was proper.

V

Rights Against Self-Incrimination

Skelton next asserts the evidence taken by the use of the corporate subpoenas was obtained and used in violation of his rights against self-incrimination. Skelton relies in the

first instance on Corporations Code section 25531, subdivision (e)[4/] claiming his compliance with subpoenas shields

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FOOTNOTE 4: "No person is excused from attending and testifying or from producing any document or record before the commissioner, or in obedience to the subpoena of the commissioner or any officer designated by him, or in any proceeding instituted by the commissioner, on the ground that the testimony or evidence (documentary or otherwise) required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after validly claiming his privilege against self-incrimination, to testify or produce evidence (documentary of otherwise), except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying."

him from prosecution based on the yielded documents. Section 25531, subdivision (e), grants immunity to a party who "after validly claiming his privilege" has been compelled to produce evidence or testify. (People v. King, 66 Cal.2d 633, 642.) The statute clearly requires the privilege be claimed if immunity is to be obtained. Skelton cooperated with authorities, claimed no privilege before surrendering the materials.

Moreover, on these facts Skelton has no valid Fifth Amendment privilege against self-incrimination. No testimonial communications were compelled, only corporate records were sought. (Bellis v. United States, 417 U.S. 85, 92 [94 S.Ct. 2179, 2184].) The fifth Amendment protects a person

"only against being incriminated by his own compelled testimonial communications." (Fisher v. United States, 425 U.S. 391, 410 [96 S.Ct. 1569, 1580], italics added; see also Andresen v. Maryland, 427 U.S. 463, 471-473 [96 S. Ct. 2737, 2744]; Matter of Grand Jury Empanelled Feb. 14, 1978 (3d Cir. 1979) 603 F.2d 469, 476-477.)

VI

Right to Cross-Examine and Confront

Skelton claims he was denied his right to confront and cross-examine witnesses Dorothea Clyne and Jill Silver. Near the end of trial, the attorneys stipulated in open court that Clyne had made a certain statement to Investigator Rassi and Silver had given certain testimony before the grand jury. Skelton's attorney responded to the

proposed stipulation, "So stipulated your Honor from Mr. Skelton." Skelton was present, made no objection. Both Clyne and Silver had previously testified at trial and had been extensively cross-examined by Skelton's attorney. Any reference to Skelton in the stipulated portion of Silver's testimony was minimal.

The right to confront and cross-examine witnesses are fundamental procedural rights. (Barber v. Page, 390 U.S. 719 [88 S.Ct. 1318]; Jennings v. Superior Court, 66 Cal.2d 867.) These rights, however, may be waived. (Boykin v. Alabama, 395 U.S. 238 [89 S.Ct. 1709].) In In re Mosley, 1 Cal.3d 913, the Supreme Court held a stipulation entered into by counsel to submit the case on the transcript of the preliminary

examination foregoing in toto a jury trial was tantamount to a plea of guilty. Yet the Supreme Court upheld Mosley's conviction because the stipulation was entered in his presence without objection and without objection at time of the finding of guilt. (Id., at pp. 924-925.)

Here, however, the facts do not approach a total waiver of jury trial by stipulation as in In re Mosley, supra, The stipulated testimonies were only a minute portion of the testimony by witnesses who had testified and had been extensively cross-examined. We find no error.

VII

Securities Instruction Challenge

Appellants contend the trial court prejudicially erred in refusing to

permit the jury to determine whether the RGW investment probrams were in fact securities.[5/] Instead the court, over

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FOOTNOTE 5: A security as defined in Corporations Code section 25019 "means any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription, transferable share; investment contract; voting trust certificate; certificate of deposit for a security; certificate of interest of participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease; any beneficial interest or other security issued in connection with a funded employees' pension, profit sharing, stock bonus, or similiar benefit plan; or, in (cont'd.)

FOOTNOTE 5: (cont'd) general, any interest or instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. All of the foregoing are securities whether or not evidenced by a written document. 'Security' does not include: (1) any beneficial interest in any voluntary inter vivos trust which is not created for the purpose of carrying on any business or solely for the purpose of voting, or (2) any beneficial interest in any testamentary trust, or (3) any insurance or endowment policy or annuity contract under which an insurance company admitted in this state promises to pay a sum of money (whether or not based upon the investment performance of a segregated fund) either in a lump sum or periodically for life or some other specified period, or (4) any franchise subject to registration under the Franchise Investment Law, or exempted from such registration by § 31100 or § 31100 of that law."

defense objection, instructed the jury:

> **"You are intructed that interests in the programs known as the 10 or 11% Option Limited Partnership Program, the Palmdale 4-plex Joint Venture Program, the PAMCO Dairy Program, the Dairivest Limited Partnership, the RGW Warehousing Joint Venture Program and the Palmdale Medical Complex Joint Venture Program are securities for the purpose of these instructions."**

Whether a written agreement constitutes a security within the corporate security law is a question of law and reviewable as such by an appellate court. (People v. Miller, 192 Cal.App.2d 414, 418; People v. Rankin, 169 Cal.App.2d 150, 160; People v. Marvin, 48 Cal.App.2d 180, 193; People v. Dutton, 41 Cal.App.2d 866, 872-873; People v. Rubens, 11 Cal.App.2d 576, 587, People v. McCalla, 63 Cal.App. 783, 789; SEC v. W. J. Howey Co., 328 U.S. 293, 299-300 [66 S.Ct. 1100, 1103].)

The Dutton court, supra, faced with the identical contention made here, held:

> "Section 19 of article VI of the Constitution of California provides that 'The court may instruct the jury regarding the law applicable to the facts of the case . . . .' Pursuant to the foregoing provision, the trial court was therefore authorized to determine as a matter of law and to instruct the jury regarding the legal effect of the terms of the challenged documents. . . . Whether or not the documents in question constituted securities was not a question of fact, but one of law, upon which the court alone could pass." (People v. Dutton, supra, 41 Cal.App.2d 866, 872-873.)
>
> "An investment contract thus came to mean a contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment.' [Citation.] This definition was uniformly

applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves. [Fn. omitted.]" (SEC v. W. J. Howey Co., supra, 328 U.S. 293, 298, citing People v. White, 124 Cal.App. 548 and Moore v. Stella, 52 Cal.App.2d 766, in support of this definition.)

And at page 300 the court held:

"Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. It follows that th arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed. The investment contracts in this instance take the form of land sales contracts, warranty deeds and service contracts which

> respondents offer to prospective investors. And respondents' failure to abide by the statutory and administrative rules in making such offerings, even though the failure result from a bona fide mistake as to the law, cannot be sanctioned under the Act."

The court then held "[t]he transactions in this case clearly involve investment contracts as so defined. (Id., at p. 299.)

Whether a particular document -- or several documents construed together -- (People v. Rankin, 169 Cal.App.2d 150, 161; El Claro Oil etc. Co. v. Daugherty, 11 Cal.App.2d 274, 281) are to be considered as a "security" within the meaning of the statutory definition is to be determined on a case by case approach. (People v. Syde, 37 Cal.2d 765, 768).

As was said in People v. Hoshor, 92 Cal.App.2d 259, 253:

> "Whether any particular instrument is a security must be determined by its own contents and language. No definition has yet been formulated that will apply to every case. Courts must look through form to the substance and determine whether the transaction contemplates the conduct of an enterprise by persons other than the investor who is to share in its profits and finally in its proceeds." (Italics added.)

VIII

The Conspiracy Pleadings

Mack asserts the trial court erred in failing to sustain his objection to the conspiracy pleadings as it was indefinite. He contends the People failed to specify the objects and scope of conspiracy and thereby denied him due process.

Here the scope of conspiracy was limited in time from June 1, 1972, to December 1, 1974. The indictment specified the purpose of the conspiracy -- to commit grand theft. Furthermore, the grand jury transcript explicitly described the underlying facts, the overt acts supporting the charge. Upon this backdrop, the court exercised sound discretion (People v. Jordan, 19 Cal.App.3d 362, 371) and determined the charge of conspiracy was sufficiently definite to provide notice. In "our simplified forms of criminal pleading it is not necessary to detail the act which each of the conspirators is to perform . . . . The accused is not entitled to the description of the 'particular circumstances thereof' which he may get from his copy of the

testimony given before the grand jury . . . and furnished to him." (People v. Gordon, 71 Cal.App.2d 606, 610-611; see also People v. Codina, 30 Cal.2d 356, 359.) We find no abuse of discretion, no miscarriage of justice arising from these pleadings. (People v. Gordon, supra, 71 Cal.App.2d 606, 611.)

IX

Violation of Evidence Code Section 1101

Curtin and Mack contend the trial court violated Evidence Code section 1101 in admitting evidence of transactions occurring in the 18-month period before the charged conspiracy commenced.

The challenged evidence was not admitted to establish the character of co-defendants Mack and Curtin in violation of Evidence Code section 1101,

subdivision (a). Rather, the investment history was relevant to grand theft and securities fraud counts. "A conspiracy may be established by . . . circumstantial evidence. The evidence may cover many transactions, extend over a long period of time, and show acts which occurred some time before the alleged formation of the conspiracy, as long as the facts shown have some bearing or some tendency to prove the ultimate facts in issue." (People v. Calhoun, 50 Cal.2d 137, 144.) Thus, relevancy, not an arbitrary time period, is the test. (Cf., People v. Collier, 111 Cal. App. 215.) The number of cows present attributed to these earlier investments circumstantially proved co-defendants conspired to commit grand theft in the later investment agreements.

The challenged evidence was admissible to establish motive, intent, preparation, plan as well as knowledge. (Evid. Code, § 1101, subd. (b); People v. Rosoto, 58 Cal.2d 304, 330.) The trial court did not abuse its discretion in admitting the evidence. (People v. Matson, supra, 13 Cal.3d 35, 40.)

Nor does Mack's statute of limitations argument have merit. It is the last overt act in furtherance of the conspiracy that triggers the running of the statute of limitations. (Bompensiero v. Superior Court, 44 Cal.2d 178, 184.

X

Conspiracy Instructions

Curtin requested a special instruction to require the jury to

unanimously agree as to which act or acts of theft the defendants had specific intent to agree to commit. Such instruction would also have required a special verdict form reflecting this finding.

The court refused this instruction but charged the jury in the language of CALJIC 6.10:

> "A conspiracy is an agreement entered into between two or more persons with the specific intent to commit the public offense of grand theft and with the further intent to commit such offense, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.
>
> "In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and

> specific intent, there must be proof of the commission of at least one of the overt acts alleged in the Indictment. It is not necessary to the guilt of any particular defendant that he himself committed the overt act, if he was one of the conspirators when such act was committed."

Further, the jury was instructed (CALJIC 17.50): "In order to reach a verdict, all 12 jurors must agree -- to the decision."

Appellants argue CALJIC 17.50 does not adequately inform the jury of the requirement they be unanimous in finding the commission of an overt act during the period of the conspiracy and unanimous in attributing specific intent to commit grand theft during the period of the individual's participation in the conspiratorial agreement.

The crime of conspiracy cannot be

found by the jury, unless there is proof beyond a reasonable doubt that one or more of the conspirators committed an overt act in furtherance of the objective of the conspiracy. (Pen. Code, § 184; People v. Williams, 97 Cal.App.3d 382, 392; Feagles v. Superior Court, 11 Cal.App.3d 735, 739.) However, such rule does not require the giving of the instruction requested by Curtin or special verdict forms to indicate which overt act(s) were proved to the requisite degree.

The federal Court of Appeals in United States v. Armone, 363 F.2d 385, 398, rejected a similar contention, stating:

> "As for Armone and Grammauta's argument, the court's charge that 'your task will be to find beyond a reasonable doubt that at least one

> of the overt acts 10 and 11, in fact, took place . . . . Now, if you find beyond a reasonable doubt that at least one of these two overt acts, 10 and 11, was committed,' coupled with his instruction that the verdict be unanimous, adequately answers this objection. 'You' and 'your' obviously refer to the jury as a body; any supposition that the jurors would take the instructions to mean that they can fragment their findings on the elements of the offense (taking overt acts arguendo to be 'elements' in this context) is strained conjecture."

The instructions here given clearly specify the elements of the crime of conspiracy including the requirement as one of those elements of "an overt act" and requires, before there can be any finding of guilt of conspiracy, "in addition to proof of the unlawful

agreement and specified intent, there must be proof of the commission of at least one of the overt acts alleged . . ." These most specific instructions must be viewed in conjunction with the unqualified requirements that proof be made beyond a reasonable doubt as to each element of an offense and that the verdict be unanimous. There is no inadequacy in the instruction given. Curtin's argument is but "strained conjecture."

XI

The Two Conspiracy Contention

Curtin contends the trial court was required to instruct the jury they were to determine whether there was one or two conspiracies and "you will not consider any such acts or declarations against any defendant unless you find,

beyond a reasonable doubt, that the person doing the act, making the declaration, was a member of the same conspiracy as was that defendant." If multiple conspiracies in fact existed, the latter instructions were required.

The case of Kotteakos v. United States, 328 U.S. 750 [66 S.Ct. 1239], distinguishes between single and multiple conspiracies. In Kotteakos, a number of different defendants arranged illegal government loans through a single broker. Although there was s single co-defendant involved in all of the transactions, the other party to the agreement was always different. The court rejected the government's theory of a single overall conspiracy, stating (at pp. 754-755): "In many

cases the other defendants did not have any relationship with one another, . . . The proof thereof admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment." However, the later case of Blumenthal v. United States, 332 U.S. 539, 558 [68 S.Ct. 248], distinguished Kotteakos, pointing out that none of the agreements in Kotteakos "were tied together as states in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. . . There was no drawing of all together in a single, over-all comprehensive plan." (See People v. Elliott, 77 Cal.App.3d

673, 685.)

And as the United States Court of Appeals for the Ninth Circuit in United States v. Hobson (1975) 519 F.2d 765, 774-775, explained:

> "The doctrine enunciated in Kotteakos . . . however, has been applied primarily in those cases where the evidence reveals the likelihood that one or more of the defendants did not know or had not agreed to the overall goals of the other co-conspirators, . . . The fact that he may not have known all of the purposes involved and all of the co-conspirators is irrelevant. Once a conspiracy is shown, only slight evidence is required to link any one defendant to the conspiracy."

(See also People v. Hess, 104 Cal.App.2d 642, 670-671.) Reliance upon Kotteakos v. United States, supra, 328 U.S. 750, is inappropriate.

The foregoing authorities compel this conclusion: The test is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy. If so, there is but a single conspiracy. (United States v. Hobson, supra, 519 F.2d 765, 775.)

Here the evidence clearly shows one overall shceme. All of the investment schemes operated under the umbrella of RGW brought in funds which were disbursed according to the immediate need of that corporation. It is true that the co-conspirators performed different functions, yet their activities overlapped into many of the different programs. While the conspirators engaged in a variety of

functions, a series of "programs," there was but one overall scheme.

Moreover, the record reflects the close substantive relationship between the various RGW programs. Funds from investments were diverted and used interchangeably wherever a program demanded. Skelton, Mack and Curtin were active at the forefront of each of these programs. The jury was properly instructed on the single conspiracy theory.

If we make the fanciful assumption the evidence warranted consideration of the two conspiracy assertions (People v. Flannel, 25 Cal.3d 668, 684, fn. 12), yet the failure to instruct does not require reversal. Adjudgment will not be reversed on the ground that two seperate conspiracies were charged as

one, unless the appellant shows that he was prejudiced thereby. (People v. Elliott, supra, 77 Cal.App.3d 673, 685; Berger v. United States, 295 U.S. 78 [55 S.Ct. 629].) Curtin has shown no prejudice from any failure to plead separate conspiracy counts.

XII

Instruction Error--CALJIC 2.03

Mack contends error in charging the jury thus: "If you find that before this trial a defendant made false or deliberately misleading statements concerning the charge upon which he is not being tried, you may consider such statements as a consciousness of guilt but is not sufficient in itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for

your determination." (CALJIC 2.03.) Mack claims no factual basis existed to authorize giving this instruction. (People v. Hannon, 19 Cal.3d 588, 598.)

The jury, however, was also instructed to "disregard any instruction which applies to a state of facts which you determine does not exist."

If we assume error, yet such misinstruction would not dictate reversal unless defendant shows prejudice resulting. (People v. Flannel, supra, 25 Cal.3d 668, 686.) None is here shown; reversal is not warranted. (People v. Watson, 46 Cal. 2d 418, 436.)

XIII

Sufficiency of Evidence Supporting Curtin's Convictions

Curtin ventures alone when he

asserts there was insufficient evidence to convict him on any theft count or on any counts in the indictment. He asserts the recent United States Supreme Court decision in Jackson v. Virginia, supra, and derived this standard:

> "The court must review the whole record in the light most favorable to the judgment below to determine whether it disclosed substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."

We approach Curtin's contention mindful of these rules.

Curtin asserts he was simply an attorney with expertise in the areas of tax shelters; that his association with the RGW group and its various "programs"

-- particularly the dairy cow and allied operations -- was to provide individual taxpayers with "tax shelters." He points the finger of responsibility at his co-defendants but at the same time asserts the United States' sale of grain to Russia caused the gross losses to the many investors. He flatly asserts he lacked the requisite intent to commit any of the offenses charged against him.

The record in this case bristles with circumstantial evidence -- for the most part uncontradicted -- much from Curtin's statements on direct and cross-examination -- that points to the requisite guilty intent -- and beyond any reasonable doubt when admeasured by a rational trier of fact. The PAMCO dairy program was developed

(commencing Oct. 1971) in large part under Curtin's direction and participation. He participated in procuring the first investment. He was one of the original five owners. He had detailed knowledge of the "program" for leasing the cows as well as operational details such as number of cows, from whom and to whom leased, intimate details of the costs involved in feeding of cows, of sale of milk, etc. He knew the investors' money was to be deposited in a "trust account" and "returned if anything went wrong."

This PAMCO money was to be used to purchase feed and secure the lease of cows. In fact, rising feed costs, excess management costs, diversion of funds to unauthorized purposes, depleted the investment funds.

Investors were not informed a $700 commission was taken from their committed funds. Similarly, North American Farms and Ranches (NAFAR), a defunct corporation in the RGW stable of corporations, operated as a middleman, charged the investors 10 percent commission to acquire cows for the lessor (Dolsen) who in turn leased the cows to the investors. Curtin received $9,000 as his share of these commissions. From investors' monies, Curtin received a retainer from RGW of $2,200 a month from May 1973 to March 1974 and had access to a "slush" fund for expenses. His offices were in the RGW suite. Curtin had a motive in keeping new investment funds flowing into the dairy program. He was a guarantor on various loans to PAMCO.

The total number of cows leased by Dolsen to PAMCO was 1,500. This was the highest count of cows on the dairy facilities. Yet an audit of the PAMCO records revealed "leases" of 2,750 cows to investors. Curtin was knowledgeable of these facts.

In August 1973, the past due accounts for feed bills totalled $150,000. A lawsuit was pending for $100.000 past due on the Western Stockman feed bill. George Christoffersen, PAMCO-Dairivest foreman/ manager, repeatedly asked Curtin for money to pay the dairy bills. During 1973, Curtin went to the dairies in Idaho once a month and talked with Christoffersen once or twice a month. Reports from the dairies were sent to Curtin, and he discussed the feed bills

and expenses. Curtin made trips to the dairies as late as April 1974. Curtin was aware in late 1973 that the dairies were short cows and discussed this with Ryan a number of times.

In may 1973, ownership of PAMCO was transferred entirely to RGW and on August 30, k973, PAMCO sold its assets to Dairivest, another corporation in the RGW family. The purpose of this transaction was to take advantage of an opportunity to double the dairies' milk quota.[6/] The sole asset of PAMCO, the milk quota, was in Curtin's name as an individual. He turned it over to Dairivest.

FOONOTE 6: The milk quota allowed a dairy to sell a certain amount of milk at a fixed base price to the milk cooperative. Excess milk was sold at a lower price.

The PAMCO management agreement called for funds to be returned to investors within thirty days if leases of cows were not implemented. This was not done. Curtin's explanations on the basis of language in the documents (drawn by him) for this failure are sufficient to give any rational juror a strong suspicion of his guilty knowledge and intent to steal.

After the transfer of PAMCO to Dairivest, Curtin protests he had no more involvement in the dairies or programs, yet as late as the fall of 1973, Curtin told insurance salesman Reed Millar, to induce him to sell the "program," the $6,850 investment was to buy feed for the investors' specific cows and the money would be returned within 30 days if the cows were not

placed.

Curtin was a signator on the PAMCO checking account and continued to sign checks through August 1974. He claims he signed checks in blank -- did not know of the (mis)use of the proceeds. Curtin signed most of the cow leases and management agreements on behalf of PAMCO through February of 1974. In December 1973, Dairivest investor funds of $18,500 were sent directly to the Idaho dairies on two occasions at the direction of Curtin.

Curtin's direct involvement in the PAMCO investments is reflected in the letters he sent to the investors and his signature on the management agreements and the purported leases of nonexistent cows. A rational jury could find a callous disregard for the truth

in a letter Curtin sent to Mr. Lloyd in May 1974 telling him his investment was as secure as any investment anywhere.

The seven Dairivest theft counts are proved as to Curtin beyond any reasonable doubt. Curtin not only drafted the Dairivest program but also signed checks on the Dairivest account through February 1974. The "brochure" used to entice investors represented the general partner of the Dairivest Limited Partnership was to be "Cow Palace Limited" of Yakima, Washington, a dairy to be operated by Dairivest Farms. In fact, negotiations to purchase Cow Palace Limited broke down in September 1973 and it was never acquired. Late in the fall of 1973, Curtin told Reed Millar (to induce him to peddle the "program") that RGW had

purchased Cow Palace a year earlier. He further represented the money invested would be held in escrow until all the limited partnerships were purchased. On trial Curtin contended the cows were not to be placed on a farm but on a lease -- paper cows on a paper lease. In fact, there were no limited partnerships formed, no certificates filed, no cows placed, and the money received from the investors was misused -- embezzled -- spent for other RGW purposes.

Curtin's intimate connection with the seven Dairivest thefts charged is reflected by the letters he sent to the investors and his signature on the articles of limited partnership. In August 1974, Curtin wrote letters to Dairivest investors thanking them and assuring them they would get an

attractive return and maximum security from their investment.

The Warehousing program was the final program resulting in grand theft convictions for Curtin. As late as March 1974, Curtin and Skelton maintained the investments received in the Warehousing program would be accumulated until a $60,000 fund was obtained. The money was then to go to a farmer as a down payment for the purchase of grain or hay. These representations were false. The money went into the Dairivest account and no hay or grain was purchased for warehousing on the dairies. Curtin drafted the Warehousing program.

In May 1974, Curtin wrote a letter to Mr. Baker giving the investment advantages and tax consequences of

Warehousing and telling him it was a highly attractive situation for him.

Curtin's responses on both direct and cross-examination were often less than candid, frequently evasive in nature. He stated the costs were a "guess" on a profit and loss statement copies from his own handwriting. Curtin's attempt at explanation of his patently false "footnote 10" to the consolidated balance sheet -- sent to investors -- is in itself sufficient to warrant a conviction for fraud, theft by false pretenses.

Curtin's description of the "Sunnybrook" dairy venture in August 1973 implies cows were in place on the farm being milked, etc.; that monies had been spent for feed -- for nonexistent cows. Yet on trial he made

the baldfaced assertion this was not a misrepresentation of fact but a "projection" -- shades of "nonoperative" Watergate facts.

In sum, there is a mountain of circumstantial evidence that points unerringly to a dishonest, thieving intent on Curtin's part extending over many years of activities. In broad outline Curtin directly participated in a scheme using multiple corporate and business entities in a kind of corporate shell game. False documents, false representations were used to obtain nearly $2 million of investors' dollars followed by misuse -- embezzlement of the funds received. While there is no "smoking gun" or a percipient witness to Curtin carrying away a barbeque set or holding a gun on a bank teller, yet

grand theft takes many forms. The record here exudes evidence, competent and believable to prove Curtin participated in, aided and abetted in theft by false pretenses, theft by embezzlement as he was charged and properly convicted. There is no merit in his contention.

Finally, that same sufficiency of the evidence supporting the grand theft charges in turn sustains the convictions under Corporations Code sections 25401 and 25541. As Curtin concedes, specific intent to defraud, to steal under Corporations Code parallels that requirement under Penal Code section 487.1. (Cf., People v. Brady, 275 Cal. App.2d 984, 996.) Mack's contentions are equally untenable.

XIV

Exempt Securities

Next appellants' focus turns to section 25110 of the Corporations Code making it "unlawful for any person to offer or sell in this state any security in an issuer transaction. . . unless such sale has been qualified . . . or unless such security or transaction is exempted under chapter 1 (commencing with section 25100) of this part." It is argued section 25110 must be read in conjunction with the general criminal charging law of Corporations Code section 25540 requiring willful violation. Curtin asserts his conduct was not willful because he acted in belief the dairy and feed tax shelter programs were exempted from Corporations Code section 25110 and by section 25102.

Corporations Code section 25102 exempts "any offer or sale, in a transaction not involving any public offering, of a bona fide general partnership, joint venture, or limited partnership interest . . ." (Subd. (f); italics added.) as PAMCO, Darivest, Ltd. and Warehousing were either general or limited partnerships or joint ventures, Curtin insists the decisive issue is whether the prosecution proved these programs were "public offerings."

The determinative factors indicating a "public offering" include: ( ) the number of offerees; (2) the relationship of the offerees to each other; (3) the relationship between the issuers and the offerees; (4) the size of the offerings; (5) The manner of

the offerings; and (6) the character of the security offered. (People v. Humphreys, 4 Cal.App.3d 693, 697.) In addition, the ease with which the security may be transferred from original purchasers and the fact the particular persons affected needed the protection of the corporate securities law are important considerations. (Id., at pp. 700-701.)

The jury was properly instructed on the guidelines to be used to determine the existence of a public offering. Defendants had the burden of proving an exemption. (Corp. Code, § 25163; People v. Park, 87 Cal.App.3d 550, 566.) "Before a judgment of conviction may be reversed for insufficiency of the evidence, it must clearly appear that on no [rational]

hypothesis whatever is there sufficient substantial evidence . . ." (People v. Humphreys, supra, 4 Cal.App.3d 693, 697; People v. Reyes, 12 Cal.3d 486, 496-497.)

Here Curtin's attack on sufficiency lacks specificity. In fact, considering each factor deemed relevant for finding a public offering, the supporting evidence is overwhelming. No limit was placed on the number of persons who could invest in the PAMCO program, nevertheless Curtin claimed because it was offered to a limited number it need not be qualified. There appears no relationship between offerees, nor between offerees and issuer, except to the extent some investors in the dairy program were also insurance customers of RGW. "The fact that the investors

are relative strangers to the issuer suggest a public offering." (People v. Humphreys, supra, 4 Cal.App.3d 693, 698.)

Additionally, "if the initial approach was made by offeror one may more readily infer the offer as public." (Id., at p. 699.) Significantly, the offeror or his agents initiated all the instant transactions. Perhaps an even greater barometer of public offering looks to the standing of the investors. As People v. Parks, 87 Cal.App.3d 550, 563, 565, emphasizes, the purpose of security law is to protect the public generally, not just skilled investors, from the imposition of fraudulent investment programs. Viewing the investors under our facts no expertise or sophistication stands out in the testimony. Most were entirely

unfamiliar with RGW.

Substantial evidence supports the jury's implied finding the RGW programs were "public offerings."

A similar result is warranted as to Curtin's claim this court erred in reinstating counts 61 through 76, 80 through 83, and count 126 of the grand jury indictment. As explained in our unpublished opinion in People v. Superior Court (4 Civ. No. 16361), the court invited and defendant failed timely to object to the informality of the amendment procedure. We reaffirm our earlier decision.

XV

The Sentences

Finally, Skelton and Mack contend the trial court erred in imposing multiple punishments contrary to the

provisions of Penal Code section 654.

Section 654 of the Penal Code commands "an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one . . ."

Appellants in addition to being convicted on numerous counts of grand theft were found guilty of Corporations Code violations under sections 25110, 25401 and 25541. The trial court sentenced defendants to prison for the term proscribed by law on one count of grand theft and ordered the remaining substantive counts concurrent. Sentence on conviction for conspiracy to commit grand theft was stayed pending appeal and completion of

sentence on remaining counts.

The question presented is whether sentence on the Corporations Code and conspiracy convictions constitutes a double punishment in light of the sentence for grand theft. The Supreme Court in People v. Miller, 18 Cal.3d 873, 885, explained:

> "Section 654 does not preclude multiple convictions but only multiple punishments for a single act or indivisible course of conduct. [Citation.] 'The proscription against double punishment . . . is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute . . . . The divisibility of a course of conduct depends upon the intent and objective of the actor,

> and if all the offenses are incident to one objective; the defendant may be punished for any one of them but not for more than one.' [Citation.] In People v. Beamon, supra, 8 Cal.3d 625, we stated that section 654 is applicable to 'limit punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in time in those instances wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental.' [Citation.]"

The Attorney General concedes the application of these principles renders impermissible the sentences imposed for violation of various sections of the Corporations Code which arose out of the same course of conduct and the same underlying intent to defraud resulting in the theft convictions. The fact

these sentences were concurrent provides no consolation. (People v. Bailey, 38 Cal.App. 693, 701.)

The trial court stay of sentence for conspiracy (in count 132) is also attacked by appellants. "A defendant cannot be punished for both a substantive offense and a conspiracy to commit it unless the conspiracy had an unlawful objective in addition to the commission of the substantive offense." (In re Romano, 64 Cal.2d 826, 828; In re Cruz, 64 Cal.2d 178; People v. Richardson, 83 Cal.App.3d 853, 868.) The People urge the defendants' conspiracy had far broader objectives than the grand theft counts for which sentence was imposed, yet the record reveals no more than the underlying intent to obtain investors' money charged

under section 487.1. Thus, sentence for conspiracy must be stricken.

Accordingly, Skelton's sentence is modified vacating the concurrent sentences as to counts 47 through 51, 57, 68 through 89, 91 through 95, 103, 104 through 116, and 120 through 132, these counts being duplicative of punishment imposed for corresponding theft convictions, In all other respects, Skelton's sentence is modified striking the concurrent sentences as to counts 47 through 54, 56 through 67, 69, 70, 78 through 82, 84 through 89, 91 through 108, 110 through 120, and 122 through 132. As modified, Mack's sentence is affirmed. Curtin's probation untainted by these defects is affirmed.

Judgments as modified are affirmed.

CERTIFIED FOR PUBLICATION.

Staniforth

WE CONCUR:

Brown, P.J.

Wiener, J.